UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
KENNETH JOY	)	Case No. 99-80238-SSM
	)	Chapter 7
Debtor	)	
	)	
VANESSA JOY	)	
	)	
Plaintiff	)	
	)	
vs.	)	Adversary Proceeding No. 99-8014
	)	
KENNETH JOY	)	
	)	
Defendant	)	

MEMORANDUM OPINION

This is an action to determine the dischargeability of the debtor's obligation under a divorce decree requiring him to pay the second mortgage against his former wife's residence. The parties have agreed that the obligation is nondischargeable under 11 U.S.C. § 523(a)(15), but they disagree as to whether the plaintiff is entitled to an award of attorney's fees for the cost of prosecuting this action. At the scheduled trial on March 3, 2000, both parties appeared by counsel and advised the court that the issue of dischargeability had been settled. Counsel for the defendant advised the court that her client would agree to pay attorney's fees of $1,400.00, but no more. Counsel for the plaintiff stated that her client had incurred $4,837.00 in fees and she sought judgment for that entire amount. The court took

the issue of attorney's fees under advisement and allowed plaintiff's counsel to submit an itemized statement of time and expenses and allowed both parties to submit legal authorities in support of their respective positions. The parties have done so, and the matter is now ripe for determination.

Background

Kenneth Joy ("the debtor") filed a voluntary petition under chapter 7 of the Bankruptcy Code in this court on March 19, 1999, and received a discharge of his dischargeable debts on July 3, 1999. The plaintiff, Vanessa Joy ("Mrs. Joy"), is the debtor's former wife. She and the debtor were divorced on April 21, 1998, after more than 13 years of marriage, by the Superior Court of Cobb County, Georgia. Relevant to the present action, the divorce decree required the debtor to pay the second mortgage on a house located at 3367 Tia Trace, Kennesaw, Georgia.[1] The house itself was awarded to the wife, who was made responsible for the first mortgage. Mrs. Joy alleges that her signature on the second mortgage was forged by the debtor, but that issue was not addressed by the Georgia divorce court.

On his schedules, the debtor listed his liability to 1st Plus Financial on the second mortgage against 3367 Tia Trace in the amount of $52,213.32 and stated, "Debtor is responsible for this pursuant to Divorce Decree." He listed Mrs. Joy on his schedule of co-debtors as being jointly liable

[1] The decree also provided for periodic alimony and child support, but there appears to be no controversy with respect to those sums, which on their face are nondischargeable under 11 U.S.C. § 523(a)(5). In any event, no action need be taken during the course of a bankruptcy to preserve a claim for child support or alimony, and any dispute as to dischargeability of such sums may be determined by a state court having jurisdiction to enforce their payment. It is only divorce-related obligations *other* than for support for which the creditor must obtain a determination of nondischargeability from the bankruptcy court. § 523(c), Bankruptcy Code; Fed.R.Bankr.P. 4007.

on the debt. On his schedule of income and expenses, he included among his monthly expenses $597.36 for "2d Mortgage."[2]

The trustee filed a report of no distribution, and the chapter 7 case has been closed. The present adversary proceeding was commenced on June 25, 1999. The defendant filed a motion to dismiss on July 30, 1999. Prior to the hearing on that motion, the plaintiff filed on September 3, 1999, a motion to amend her complaint, together with the amended complaint. By memorandum opinion and order of October 12, 1999, Chief Judge Douglas O. Tice, Jr. of this court denied the motion to dismiss and granted the motion to amend the complaint.

The amended complaint alleges that the debtor's liability to the plaintiff to make the payments on the second deed of trust is nondischargeable under § 523(a)(15), Bankruptcy Code, as a debt incurred in connection with a divorce decree, as well as under § 523(a)(2)(A), Bankruptcy Code, as a debt incurred by fraud. The complaint seeks a determination that the $55,000 owed on the second mortgage is nondischargeable; a money judgment in favor of the plaintiff for $55,000; and "such other and further relief as is just, including reasonable costs and attorney's fees." Following to the trial, counsel for the plaintiff has submitted a statement reflecting 34.25 hours of attorney time devoted to the

[2] The net monthly income was shown as $4,144.17, and total monthly expenses (including the second mortgage) as $4,042.81. The debtor's statement of intent with respect to the 1st Plus liability stated: "Property will be retained, original debt will be kept current."

prosecution of this action[3] and $600.45 in expenses.[4] At $150.00 per hour for the attorney time, the plaintiff is seeking total fees and costs of $5,737.95.

Discussion

I.

This court has subject matter jurisdiction under 28 U.S.C. §§ 1334 and 157(a) and the general order of reference from the United States District Court for the Eastern District of Virginia dated August 15, 1984. Under 28 U.S.C. § 157(b)(2)(I), this is a core proceeding in which a final judgments or orders may be entered by a bankruptcy judge. Venue is proper in this district under 28 U.S.C. § 1409(a). The defendant has been properly served and has appeared generally.

II.

A.

No provision of the Bankruptcy Code expressly provides for an award of attorney's fees to a prevailing party in dischargeability litigation, except where the defendant is the prevailing party in an action brought on a consumer debt that is asserted to be nondischargeable on the ground of fraud. § 523(d), Bankruptcy Code. The majority view, however, is that attorney's fees may be awarded where applicable nonbankruptcy law would allow for such award in an action to enforce the underlying liability. *TranSouth Fin. Corp. of Florida v. Johnson*, 931 F.2d 1505, 1507 (11th Cir. 1991); *but see Sunclipse, Inc. v. Butcher (In re Butcher)*, 200 B.R. 675, 677-8 & n.3 (Bankr. C.D. Calif. 1996)

[3] This includes 2.0 hours spent in preparing the post-trial submission on the issue of fees.

[4] This includes the $150.00 filing fee for the adversary proceeding, which would be recoverable in any event as court costs. *See D & B Countryside L.L.C. v. Newell (In re D&B Countryside, L.L.C.)*, 217 B.R. 72 (Bankr. E.D. Va. 1998).

(discussing disagreement among circuits). For example, where a creditor sues for a determination that sums due under a promissory note are nondischargeable, and the note contains language permitting recovery of attorney's fees incurred in enforcing the note, the court may award fees incurred in prosecuting the dischargeability action. *TranSouth*, 931 F.2d at 1507.

The only authority cited by the plaintiff for an award of attorney's fees in this case is Federal Rule of Bankruptcy Procedure 9011(c),[5] which allows the court to award sanctions, which may include "payment . . . of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation," against a party who has violated Rule 9011(b). Rule 9011(b) in turn provides as follows:

> (b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

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[5] Since the underlying liability arises under Georgia law, the court has independently researched whether Georgia law would allow the recovery of attorney's fees in an action to enforce that liability. In this connection, Ga. Code. Ann. § 19-6-2 allows a court to award attorneys fees in its "sound discretion," and taking into account "the financial circumstances of both parties," in an action "for alimony, divorce and alimony, or contempt of court arising out of either an alimony case or a divorce and alimony case, including but not limited to contempt of court orders involving property division, child custody, and child visitation rights." The court has been unable, however, to find any reported case in which a bankruptcy court has relied on this statute to allow attorney's fees to a non-debtor spouse in an action to determine dischargeability of a divorce-related obligation. Given that the present dischargeability proceeding, while it grows out of an action for divorce, is not itself an action for divorce nor for contempt, the court concludes that Ga. Code Ann. § 19-6-2 does not provide a basis for this court to award of counsel fees to the plaintiff.

> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
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> (3) the allegations and other factual contentions have evidentiary support after a reasonable opportunity for further investigation or discovery; and
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> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Essentially, the plaintiff argues that the debtor acted in bad faith when he "sought discharge" of the mortgage obligation in bankruptcy[6] and that his defense of this adversary proceeding was frivolous from the outset and subjected the plaintiff to unnecessary trouble and expense.

B.

There can be little doubt that, until shortly prior to the scheduled trial,[7] the debtor aggressively defended this action. He filed a motion to dismiss the original complaint, opposed the plaintiff's motion to amend her complaint, and filed a motion for protective order (arguing that he should not have to respond to discovery, because the complaint failed to state a claim for relief) – all of which were decided adversely to him. It is true that the motion to dismiss, in particular, was summarily rejected by Judge Tice in two sentences. At the same time, the original complaint is hardly a model of clear

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[6] This does not appear to be a case where the debtor filed chapter 7 solely to discharge a divorce obligation. The debtor's schedules listed a total of $165,878 in unsecured debt, and, as noted, his statement of intent reflected an intent to continue paying the mortgage.

[7] The plaintiff represents, and the defendant does not deny, that the settlement was reached on February 29, 2000, three days prior to the trial.

pleading.[8] Much of the confusion stems from the inartful framing of the issue in the original complaint, which requested a determination that *Mrs. Joy* "had no liability" for the second mortgage, as opposed to a determination that the debtor's liability to Mrs. Joy to pay the mortgage was nondischargeable.[9] In any event, once the amended complaint was filed, the debtor promptly answered, and the case proceeded straightforwardly to trial.

The plaintiff asserts, however, that the debtor never had a good-faith basis for defending this action and unjustifiably waited until three days before the trial to settle. As noted, the complaint asserts two independent grounds for nondischargeability, and the settlement concedes only one of them, namely, the exception in § 523(a)(15) for divorce-related obligations. With respect to the other – the allegation that the obligation arose as a result of the debtor's fraud in forging Mrs. Joy's signature on the second mortgage – there has been no evidence presented, and the court has no basis for finding that the debtor's defense of that issue would have been frivolous. Although the debtor admits that he signed Mrs. Joy's name to the mortgage, he asserts that she knew he had done so and that she willingly endorsed the loan proceeds check and used a portion of the proceeds to pay off the note on an

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[8] Among other things, it cited only to a nonexistent "§ 523(2)(11)" of the Bankruptcy Code as the basis for nondischargeability.

[9] For example, even the amended complaint grumbles that the debtor improperly listed Mrs. Joy as a co-debtor on the mortgage. Not only was this not improper, it was required. The divorce decree did not and could not erase Mrs. Joy's liability to the mortgage company, since the mortgage company was not a party to the divorce case. All the divorce decree said was that, as between the debtor and Mrs. Joy, the debtor was responsible for the mortgage payment. In effect, what the divorce decree did was to create a duty on the debtor's part to indemnify Mrs. Joy with respect to the second mortgage. It did not, however, affect any legal right of the mortgage company to proceed against Mrs. Joy. Thus, Mrs. Joy was accurately described as a co-debtor, because the mortgage company has a claim against her, even though that claim is disputed.

automobile that was awarded to her by the divorce decree. Such evidence, if believed by the trier of fact, would be sufficient to defeat a finding that the debtor committed a fraud on Mrs. Joy.[10] Since the court has no evidentiary basis for finding that the debtor's defense of the fraud allegations was unwarranted or frivolous, Rule 9011 sanctions cannot be imposed based on the debtor's defense of that issue.

C.

Whether the debtor had a reasonable basis for defending the § 523(a)(15) component of the action is a closer question. In this connection, two types of divorce-related debts survive a chapter 7 bankruptcy discharge. The first category consists of debts "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record[.]" § 523(a)(5), Bankruptcy Code. The second category consists of debts, other than support debts, "incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record[.]" § 523(a)(15), Bankruptcy Code. The latter, however, is subject to the exception that such debts will be discharged if

> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

[10] Whether he committed a fraud on the mortgage company is a separate issue as to which the court expresses no view, since the mortgage company is not a party to this action.

> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

Id. Thus, debts for spousal or child support are never dischargeable, but other types of divorce-related debts, including equitable distribution judgments, will be discharged if the debtor cannot afford to pay them or if the benefit to the debtor from discharging them outweighs the detriment to the other party.

The debtor bears the burden of proof, by a preponderance of the evidence, both as to his inability to pay and as to the benefit of discharge outweighing the detriment to the nondebtor party. *Craig v. Craig (In re Craig*), 196 B.R. 305, 308-09 (Bankr. E.D. Va. 1996); *King v. Speaks (In re Speaks)*, 193 B.R. 436, 441 (Bankr. E.D. Va. 1995); *but see Collins v. Hesson (In re Hesson),* 190 B.R. 229 (Bankr. D. Md. 1995) (debtor has burden on inability to pay but nondebtor has burden to prove that detriment outweighs benefit of discharge). Because § 523(a)(15) is phrased in the disjunctive, a debtor need prove only one of the two possible grounds for discharging the debt. *Craig,* 196 B.R. at 309. With regard to ability to pay, the test is not whether the debtor has the ability to pay the debt as of a particular time — such as the date of trial — but whether the debtor can pay the debt over time. *Id.* at 310. In determining whether the benefit to the debtor from discharging the debt would outweigh the resulting detriment to the nondebtor party, the factors usually considered include the income and expenses of both parties, whether the nondebtor spouse is jointly liable on the debts, the number of dependents, the nature of the debts, the reaffirmation of any debts, the nondebtor spouse's ability to pay, and whether the debt can actually be collected from the nondebtor spouse. *Id.* at 309.

The plaintiff argues at some length in her post-trial submission that the obligation to pay the second mortgage was indisputably in the nature of support and therefore nondischargeable under § 523(a)(5), Bankruptcy Code. While the plaintiff's argument has considerable force and might very well have carried the day had it come to trial,[11] the fact remains that the complaint did not, either expressly or by fair implication, *plead* § 523(a)(5) as a basis for excepting the debt from discharge. The *only* pleaded grounds for excepting the debt from discharge were §§ 523(a)(2) and 523(a)(15). The whole purpose of pleadings is to frame the issues for trial, and the court can hardly find the debtor to be at fault for not immediately conceding that the debt was nondischargeable based on a cause of action that the plaintiff might have, but did not, plead.

The complaint did, of course, plead § 523(a)(15) as a basis for nondischargeability, and here the debtor's legal position, viewed objectively, must certainly be characterized as weak. There is no dispute that the obligation to pay the second mortgage arose as a result of a divorce decree. Accordingly, it was presumptively nondischargeable and could not be discharged unless the debtor prevailed on one of the two affirmative defenses. Since the debtor's income and expense schedules in his chapter 7 case showed that he had sufficient income to make the payment on the second mortgage in addition to his other necessary expenses, it is difficult to see how (at least in the absence of dramatically-changed circumstances since the bankruptcy filing) he could have satisfied his burden under § 523(a)(15)(A) to show that he was unable to pay the debt. He could succeed on the issue of

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[11] This is not to say that the debtor's argument to the contrary in his post-trial submission can be lightly brushed aside. But since the issue of whether the second mortgage obligation is actually in the nature of support has never been framed by the pleadings, the court is not required to reach that issue.

dischargeability, therefore, only by showing that the benefit to him from discharging the debt would outweigh the detriment to Mrs. Joy. Given the relative disparity in their incomes as reflected in the findings made by the Georgia divorce court,[12] this would certainly have been an uphill task. However, it would not have been unreasonable for the debtor to have conducted some discovery as to Mrs. Joy's present financial circumstances before conceding the issue. In the present case, the debtor did attempt to propound discovery, but unfortunately waited after the discovery cutoff had passed. Given the very limited cards he held, the debtor should probably have folded at that point.[13] Nevertheless, the court is unable to conclude that the issue of dischargeability was so clear-cut that a defense was wholly futile or that the debtor's purpose in holding out for another seven weeks until three days prior to the trial was solely to harass Mrs. Joy or to cause her needless delay or expense. Under the circumstances, the concession by the debtor that he should pay $1,400.00 of Mrs. Joy's legal expenses seems appropriate, but the court cannot find that there is a factual or legal basis for requiring him to pay the remainder of the attorney's fees.

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[12] The decree found that the debtor's income was $56,136 per year and that Mrs. Joy's was $17,877.

[13] His motion to compel responses to the discovery was denied on January 11, 2000, which was the same date at the pretrial conference. It was at the pretrial conference that the trial date of March 3, 2000, was set.

III.

A separate judgment will be entered determining that the debtor's liability to Mrs. Joy to pay the second mortgage in accordance with the divorce decree is nondischargeable and awarding her $1,400.00 in attorneys fees, together with the costs of this action.

Date: March 20, 2000

Alexandria, Virginia

___*/s/ Stephen S. Mitchell*_____
Stephen S. Mitchell
United States Bankruptcy Judge

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